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No. 90-53

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JERRY TUCKER,

Petitioner,

v.

OWEN BIEBER and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S REPLY BRIEF

JOSEPH A. YABLONSKI
(Counsel of Record)
DANIEL B. EDELMAN
JOHN F. COLWELL
YABLONSKI, BOTH & EDELMAN
Suite 800
1140 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9060

JOSEPH L. RAUH, JR.
3625 Appleton St., N.W.
Washington, D.C. 20008
(202) 363-7993

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITIONER'S REPLY BRIEF

Petitioner Jerry Tucker submits this reply brief in support of his Petition for Writ of Certiorari.

A. The Decision Below Presents a Clear Issue of National Importance: Whether Union Incumbents Can, With Impunity, Discharge Appointed Staff Members Who Exercise Their Guaranteed Rights to Run for Union Office.

In the Petition, we maintained that from the standpoint of union democracy, which Congress sought to

foster by the enactment of the Labor-Management Reporting and Disclosure Act ("LMRDA"), this case might be the most important ever to come before this Court. The decision below, we said:

> [p]ermit[s] incumbent officers to maintain party discipline by discharging "disloyal" staff members for exercising protected electoral rights [,] frustrates the free choice of leaders by the union rank-and-file and insures the perpetuation of the one-party system. It squelches opposition candidacies by the sole persons with realistic prospects of unseating entrenched incumbents.

Pet. at p. 13. Respondents' opposition never addresses these important reasons for granting the Petition and ignores altogether this Court's consistent recognition that the LMRDA must be interpreted in light of Congress' basic objective of ensuring that unions are democratically governed and responsive to their rank-and-file members.

In the face of this Court's majority and dissenting opinions in *United Steelworkers of America v. Sadlowski*, 457 U.S. 102 (1982), underscoring the importance of staff candidates to Congress' objective of fair and open union elections, the UAW's Opposition reveals that it reads the decision below as a license for entrenched incumbents in a one-party union to retaliate against any electoral challenge mounted by an appointed official. The UAW argues that this Court need not "explore the finer points of some 'chilling effect,' visited upon an appointed staff member who [has the temerity] . . . to run against the very elected officials who appointed him." Opp. at pp. 5-6.[1] The UAW thus confirms the importance of this

[1] The UAW claims that Tucker wanted "to be paid" to run against the incumbent who, incidentally, was also being paid while he was a candidate for re-election. The record fact is Tucker had requested an unpaid leave-of-absence, but "the requested leave was denied him. He was instead discharged from his staff position at Owen Bieber's behest . . . ." (A. 22a).

case to the enforcement of the LMRDA and to its overall objective that unions be governed from the bottom up and not from the top down.

The UAW tacitly concedes that *this* Union's membership, through the UAW Constitution, conferred upon Tucker and other appointed staff members the unconditional right to run for union office. The UAW never denies that the "90-day" Rule, which the Secretary of Labor has challenged as illegal, operates only when an incumbent is challenged. Nor does it deny that the "90-day" Rule was a caucus rule, adopted by the UAW hierarchy, which had never been submitted to or approved by the Union's members. The UAW acknowledges that Tucker "was fired for violation of this rule," Opp. at p. 3, created by incumbents for their own protection.

By arguing that the election-eve "removal of an appointed official does not violate membership rights protected under § 101" of LMRDA (Opp. at p. 7), the UAW ignores this Court's holding in *Finnegan v. Leu*, 456 U.S. 431, 441 (1982), that discharges such as Tucker's—part of a purposeful attempt to suppress dissent by destroying a fledgling opposition party—*are* indeed cognizable claims under LMRDA § 101. See Pet. at p. 15.

Most telling, finally, is the UAW's misguided assertion that this case presents "no call to regress into confused and uncertain speculations about 'chilling effect.'" Opp. at p. 7. This Court has long recognized that retaliatory conduct toward activist union members does chill the exercise of rights by other union members, and that it is actionable precisely because others may be intimidated from exercising their statutory rights. The "chilling effect" of abuses of power by union incumbents is not some vague, illusive, or esoteric concept. It has been the guiding principle that has informed this Court's decisions in *Hall v. Cole*, 412 U.S. 1 (1973), in *Finnegan v. Leu*, 456 U.S. 431 (1982), and in *Sheet Metal Work-*

ers Int'l Ass'n v. Lynn, —— U.S. ——, 109 S.Ct. 639 (1989). It is precisely because the courts below (and now the UAW) have ignored the effect that Tucker's firing had on other UAW members, that the decision below should be reviewed and reversed by this Court.

B. The Decision Below Is in Conflict with the Decisions of Other Courts of Appeals on Whether a Union Member's Union-Constitution Based Claims Are Federal Claims.

Respondents acknowledge, as they must, that the Circuits have split on whether jurisdiction under § 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, extends to claims like Tucker's. Opp. at p. 7.

Contrary to Respondents' suggestion, this case is a proper vehicle for resolving this Circuit conflict. We have argued that the jurisdictional ruling below determined the outcome of Tucker's union constitution-based claims. Had the Sixth Circuit looked to federal law and policy, it would have been obliged to uphold those claims, in light of this Court's decision in *Local 3489, United Steelworkers of America v. Usery*, 429 U.S. 305 (1977), and a corresponding regulation of the Secretary of Labor invalidating advance candidacy-declaration rules. 29 C.F.R. § 452.51. Respondents never contend otherwise.

It is no answer, then, to say that the conflict among the Circuits is not a "vigorous split"—whatever this may mean. This case turned on that split, and future cases may as well—including disputes over official discharges. *Cf. Rutledge v. Aluminum Workers Int'l Union*, 737 F.2d 965, 970 & nn. 6-8 (11th Cir. 1984) (remanding discharged union official's constitution-based claim to district court for exercise of pendent jurisdiction and reserving determination of federal jurisdictional issue).[2]

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[2] As we have previously suggested, cases involving not simply the discharge of appointed union officials, but the discharge of

CONCLUSION

For all of the reasons offered here and in the Petition, a writ of certiorari should be granted, and the decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

JOSEPH A. YABLONSKI
(Counsel of Record)
DANIEL B. EDELMAN
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YABLONSKI, BOTH & EDELMAN
Suite 800
1140 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9060

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staff-member candidates are not rare. *See, e.g., Retail Clerks Union, Local 648 v. Retail Clerks Int'l Ass'n*, 299 F. Supp. 1012 (D.D.C. 1969); *Yablonski v. United Mine Workers of America*, 71 L.R.R.M. (BNA) 3041 (D.D.C. 1969). In the wake of the decision below, of course, such discharges may become commonplace.